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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 JESE DAVID CARILLO CASILLAS
15 (2),
16 GABRIELA MENDOZA VAZQUEZ
17 (7),
18 JULIO CESAR ROSALES SAUCEDO
19 (9),
20 BRITTNEY LEE ZARAGOZA (10),
21 SALVADOR GUDINO CHAVEZ (11),
22 EDGAR OMAR HERERRA FARIAS
23 (16),
24 ALFREDO MAGANA GARIBAY, aka
25 FREDDY (18)
26 JUAN BRAVO ZAMBRANO (19),
27 MIGUEL REYES GARCIA (21), and
28 JOSE ADRIAN MENDOZA (23)

Defendants.

4:15-CR-6049-EFS

United States Response to Defendant's
Notice Regarding Challenge to
Government Expert

Plaintiff, United States of America, by and through Joseph H. Harrington,
Acting United States Attorney, for the Eastern District of Washington, and Stephanie
Van Marter, Assistant United States Attorney for the Eastern District of Washington,
United States Response to Defendant's Notice Regarding Challenge to Government
Expert -1

1 hereby submits its response to Defendant's Notice Regarding Challenge to
2 Government Expert (ECF No. 579).

3 The United States has been conversing with counsel for Defendant Casillas
4 regarding the proposed Modus Operandi testimony. In conjunction with this
5 memorandum, the United States has filed a supplemental notice in an attempt to
6 address some of counsel's questions in regard to the proposed testimony. However,
7 given the lack of clarity in Defendant's notice of objection, the United States provides
8 the following responsive memoranda.
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11 **I. IN A CONSPIRACY PROSECUTION, EXPERT MODUS**
12 **OPERANDI TESTIMONY IS PROPER**

13 The purpose of any offered expert testimony is to assist jurors in determining
14 the legal significance of the evidence and to help them to understand it. For over 30
15 years, the Ninth Circuit has held that expert testimony about the modus operandi of
16 criminal activity especially within a criminal organization is relevant and helpful to
17 the jury. See *United States v. Maher*, 645 F.2d 780, 783-784 (9th Cir. 1981)(per
18 curiam) (allowing modus operandi testimony about countersurveillance in drug case).
19 "[I]t is commonplace that expert testimony regarding the structure of criminal
20 enterprises is admissible to help the jury assess a defendant's involvement in that
21 enterprise." *United States v. Valencia-Amezcu*a, 278 F.3d 901 (9th Cir. 2001).
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23 In *United States v. Johnson*, 735 F.2d 1200, 1201 (9th Cir. 1984), the Court
24 explained that modus operandi evidence is admissible because it helps the jury
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26 United States Response to Defendant's Notice Regarding Challenge to Government
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1 understand how "combinations of seemingly innocuous events may indicate criminal
2 behavior." Law enforcement experts know the methods used by criminals. Jurors
3 don't. Consequently, expert testimony is relevant and helpful to jurors considering
4 whether certain facts prove a crime. This rule was well established in 1984 when
5 *Johnson* noted, "The federal courts uniformly hold ... that [expert witnesses] may
6 testify as to the general practice of criminals to establish the defendant's modus
7 operandi." *Id.* at 1202.
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10 In the last several years however, the Ninth Circuit has drawn some limitations
11 to this testimony specifically when faced with proposed modus operandi testimony
12 where there was no larger conspiracy charged. As a result, the Ninth Circuit has held
13 that expert testimony regarding the structure of narcotics trafficking organizations
14 introduced in order to prove knowledge should be excluded under Federal Rules of
15 Evidence, Rule 403 unless the defendant is charged with conspiracy or raises some
16 other issue as probative of his lack of knowledge. See, *United States v. Pineda-Torres*,
17 287 F.3d 860, 864-865 (9th Cir.), *cert. denied*, 537 U.S. 1066, 123 S.Ct. 661, 154
18 L.Ed.2d 555 (2002) (distinguishing drug courier testimony from structure testimony);
19 *United States v. Varela-Rivera*, 279 F.3d 1174 (9th Cir.2002) (expert testimony
20 regarding structure and methods of drug trafficking organizations inadmissible in non-
21 conspiracy importation case); *United States v. Vallejo*, 237 F.3d 1008, 1016-1017 (9th
22 Cir.2001), as amended, 246 F.3d 1150 (9th Cir.2001).
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1 Despite this limitation, the Ninth Circuit has clearly noted neither *Vallejo* nor its
2 progeny supports the establishment of a per se rule that expert testimony regarding the
3 operation and structure of drug trafficking organizations or the modus operandi of
4 couriers involved in drug trafficking organizations is inadmissible. In *United States*
5 *v. Sepulveda-Barraza*, 645 F.3d 1066, 1071 (9th Cir. 2011), the Ninth Circuit agreed
6 that such a per se rule would be inconsistent with the case-by-case approach mandated
7 by Federal Rule of Evidence, Rule 403. See, *United States v. Hinkson*, 585 F.3d 1247,
8 1267 (9th Cir.2009) (en banc) (observing that “the considerations arising under Rule
9 403 are susceptible only to case-by-case determinations” (internal quotation marks
10 omitted)); *United States v. Valencia–Amezcu*a, 278 F.3d 901 (9th Cir.2002). *United*
11 *States v. Venegas–Reynoso*, 524 Fed.Appx. 373, 375-376 (9th Cir. 2013).

12 Thus, in a Conspiracy case such as this, those limitations do not apply as the
13 clear standard is still that “[G]overnment agents or similar persons may testify as to
14 the general practices of criminals to establish the defendants' modus operandi.” *United*
15 *States v. Gil*, 58 F.3d 1414, 1422 (9th Cir.1995) (quoting *United States v. Johnson*,
16 735 F.2d 1200, 1202 (9th Cir.1984)); See also, *United States v. Dimas*, 532 Fed.Appx.
17 746, 748 (9th Cir. 2013); *United States v. Freeman*, 498 F.3d 893, 906–07 (9th
18 Cir.2007)(finding in part that officers testimony as to the general practices of drug
19 traffickers and an opinion that a notebook was a “pay ledger” commonly used in the
20 drug trade was admissible); *United States v. Valencia Amezcu*a, 278 F.3d 901, 908

1 (9th Cir.2002)(finding that there is clear precedent as to the admissibility of expert
2 testimony regarding the general modus operandi of methamphetamine traffickers).

3 Moreover, in *United States v. Ogedengbe*, 187 Fed.Appx. 715, 716, 2006 WL
4 1876858, at *1 (9th Cir. 2006), the Ninth Circuit found that the trial court did not
5 abuse its discretion in allowing testimony by a government expert concerning the
6 structure and practices of complex international drug smuggling organizations, “[T]his
7 court has consistently approved the use of such evidence in cases like the present,
8 which involve a defendant accused of involvement in a complex drug conspiracy. *Id*;
9 citing, *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1259-60 (9th Cir.1998),
10 cert. denied, 528 U.S. 842, 120 S.Ct. 311, 145 L.Ed.2d 94 (1999); *United States v.*
11 *Kearns*, 61 F.3d 1422, 1427 (9th Cir.1995). See, e.g., *United States v. Varela-Rivera*,
12 279 F.3d 1174, 1179 (9th Cir.2002) (noting that modus operandi testimony is
13 generally inadmissible unless the defendant is charged with conspiracy).

14 In this case, the Defendants have been charged with Conspiracy to Distribute
15 Methamphetamine, Cocaine, Heroin and Fentanyl as well as Conspiracy to Commit
16 Money Laundering to include International Money Laundering. This is not a single
17 count smuggling case. This is a complex drug trafficking case where modus operandi
18 testimony will help the jury to understand the organization, the roles of those involved
19 and a context with which to understand the physical evidence. This type of testimony
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1 is a specialized body of knowledge that is beyond the knowledge and understanding of
2 the average juror. It is the proper subject for this type of expert testimony.

3 As is common in cases such as this, the presentation of lay witness testimony
4 can at times obviate the need to present further modus operandi expert testimony. In
5 this case, the United States anticipates that it will be calling a number of lay witnesses
6 who will also provide testimony as to this drug trafficking organization. Specifically,
7 the United States will be calling fact witnesses that include both law enforcement
8 witnesses and cooperating Defendants/informants who have either participated
9 directly in aspects of this investigation or who are members of this drug trafficking
10 organization and therefore have direct knowledge as to relevant and material facts as
11 to the organization. Such testimony would be offered pursuant to Federal Rules of
12 Evidence, Rule 701. A lay witness may opine about a person's role in an organization
13 when the opinion is based on his own perceptions, is helpful to the jury, and does not
14 require specialized knowledge. *See* Fed.R.Evid. 701; *United States v. Figueroa–*
15 *Lopez*, 125 F.3d 1241, 1245–46 (9th Cir.1997) (explaining that lay witnesses may
16 testify about the implication of an observation when the “observations are common
17 enough and require such a limited amount of expertise, if any, that they can, indeed,
18 be deemed lay witness opinion”).

19 The United States therefore recognizes that its notice of modus operandi expert
20 testimony is somewhat dependent upon the presentation of the lay witnesses’
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1 testimony as the United States has no intention of duplicating testimony. However, in
2 order to comply with its Rule 16 obligations, the United States properly provided
3 notice of its intent to also call modus operandi experts should it be necessary.
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5 The Defendant has filed an incomplete objection to this proposed testimony
6 indicating it has requested additional information from the United States. The United
7 States has filed with this memorandum, a supplement to its modus operandi notice
8 addressing some of those questions raised by the Defendant. Specifically, the
9 Defendant asked for clarification as to which expert would be offering which
10 testimony as detailed in the notice. The United States has attempted to address that
11 question by noting which proposed expert would address which issue. In this case,
12 the majority of the proposed modus operandi expert testimony will be offered by SA
13 Leahy. Given the international implications in this case, the United States has also
14 noticed the potential expert testimony of Sgt. Barlow and Constable Kimura¹. Both of
15 these witnesses are members of the Royal Canadian Mounted Police who assisted in
16 this investigation. The United States anticipates that it will likely not require both to
17 provide expert testimony. Their proposed modus operandi testimony as explained in
18 the notice, will focus on those issues specific to Canada: namely the difference in drug
19 pricing and the use of smuggling routes from this District into Canada.
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26 ¹ The United States has provided all three of their curriculum vitae, which provide in
27 detail their training and experience.

1 The United States respectfully submits this proposed modus operandi testimony
2 in a complex drug trafficking conspiracy case such as this, is proper and admissible.

3 Dated: December 15, 2017
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5 JOSEPH H. HARRINGTON
6 Acting United States Attorney

7 *s/Stephanie Van Marter*
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9 Stephanie Van Marter
10 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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